c. The court of appeals affirmed. Pet. App. 60a-66a. The court observed that, in both of petitioner's previous appeals, it had rejected on the merits petitioner's claim that he had received ineffective assistance of counsel. *Id.* at 60a. The court therefore held that the law of the case doctrine barred petitioner from again alleging ineffective assistance of counsel. The court acknowledged that the law of the case doctrine is inapplicable when "the substantive law has changed or when evidence that could not have been discovered earlier despite diligent inquiries at last comes to light." *Id.* at 63a. The court explained that, although petitioner sought "to present new instances of supposed shortcomings" with respect to his counsel's performance, "it is the overall deficient performance, rather than a specific failing, that constitutes the ground of relief" in an ineffectiveness claim. *Ibid.* Although the court understood the Tenth Circuit to have adopted a different approach in *United States* v. *Galloway*, 56 F.3d 1239 (1995) (en banc), the court was not persuaded by that decision "to abandon the doctrine of law of the case." Pet. App. 66a.

The court of appeals rejected petitioner's reliance on this Court's decision in *Massaro* v. *United States*, 538 U.S. 500 (2003), which held that a defendant does not procedurally default an ineffectiveness claim by failing to raise it in a direct appeal of his conviction. The court of appeals explained that, while *Massaro* allows a defendant to wait until collateral review to raise an ineffectiveness claim, the decision "does not hold that the same ground of relief may be raised *twice*, once on direct appeal and again on collateral review." Pet. App. 64a. In this case, petitioner's "only argument is that [he] received ineffective assistance at trial," and "[t]hat argu-

ment has been considered and rejected before." *Id.* at 66a.

ARGUMENT

Petitioner seeks this Court's review on the question whether the assertion of a claim of ineffective assistance of trial counsel on direct appeal bars a defendant from again raising a claim of ineffective assistance in a motion for collateral relief under 28 U.S.C. 2255, where the collateral claim relies on aspects of trial counsel's performance that were not raised on direct appeal. See Pet. 6-18. There is no warrant for granting review of that question.

1. The Court's review is unwarranted for the threshold reason that the issue is likely to arise only rarely. This Court held in *Massaro*, *supra*, that "an ineffective-assistance-of-counsel claim may be brought in a collateral proceeding under § 2255, whether or not the petitioner could have raised the claim on direct appeal." 538 U.S. at 504. The court explained that resolution of ineffectiveness claims on collateral review "is preferable to direct appeal" because, "[w]hen an ineffective-assistance claim is brought on direct appeal, appellate counsel and the court must proceed on a trial record not developed precisely for the object of litigating or preserving the claim and thus often incomplete or inadequate for the purpose." *Id.* at 504-505. The Court observed that, under the rule it established, "ineffective-assistance claims ordinarily will be litigated in the first instance in the district court" rather than in the court of appeals. *Id.* at 505.

After *Massaro*, a defendant is never required to raise a claim of ineffective assistance on direct appeal, and such claims "ordinarily" will be raised and resolved

on collateral review. 538 U.S. at 505. Although a defendant on occasion nonetheless might elect to present an ineffectiveness claim on direct appeal, the court of appeals is not required to address it, and presumably would remit the defendant to collateral review under Section 2255 except in an unusual situation in which the record permits resolution of the claim on direct review. See, *e.g.*, *United States* v. *Reyes-Platero*, 224 F.3d 1112, 1116-1117 (9th Cir. 2000), cert. denied, 531 U.S. 1117 (2001); *United States* v. *Williams*, 205 F.3d 23, 35-36 (2d Cir.), cert. denied, 513 U.S. 228 (2000); *United States* v. *Haywood*, 155 F.3d 674, 678 (3d Cir. 1998). This Court opined in *Massaro* that "few [ineffectiveness] claims will be capable of resolution on direct review," 538 U.S. at 507, and petitioner admits that such claims will be "uncommon." Pet. 12 n.8. The issue raised by petitioner therefore could arise only in a case in which a defendant elects to raise an ineffectiveness claim on direct appeal, the court of appeals elects to resolve the claim after determining that the case presents the unusual situation in which the trial record permits resolution of an ineffectiveness claim, the court denies relief, and the defendant subsequently raises an ineffectiveness claim based on different alleged attorney errors in a Section 2255 proceeding. Those circumstances should rarely arise.

2. Petitioner argues (Pet. 8-11) that the court of appeals' application of the law of the case doctrine conflicts with the approaches of the Tenth Circuit in *United States* v. *Galloway*, 56 F.3d 1239 (1995), and the Second Circuit in *Riascos-Prado* v. *United States*, 66 F.3d 30 (1995). With respect to the Second Circuit, however, it is unclear whether that court will continue the approach it adopted in *Riascos-Prado* after this Court's interven-

ing decision in *Massaro*. At the time of the Second Circuit's decision in *Riascos-Prado*, the rule in that court, pursuant to *Billy-Eko* v. *United States*, 8 F.3d 111 (2d Cir. 1993), was that a defendant represented by new counsel on appeal was required to raise an ineffectiveness claim on direct appeal if the claim was based solely on the record developed at trial. At the same time, the Second Circuit also adhered to the general rule that a defendant who raised a claim on direct appeal was barred from raising the same claim on collateral review. See *Williams* v. *United States*, 731 F.2d 138, 141 (2d Cir. 1984), cert. denied, 469 U.S. 1188 (1985).

The court reasoned in *Riascos-Prado* that, in light of those two rules, an approach that treated all ineffectiveness claims as presenting a single ground of relief would leave appellate counsel "in a legal quandary," with counsel potentially required by *Billy-Eko* to raise certain attorney errors on direct appeal but then potentially barred from raising different attorney errors on collateral review. 66 F.3d at 35. The court therefore held that a defendant was not barred from raising alleged attorney errors on collateral review that had not been presented on direct appeal. The dilemma that gave rise to that holding no longer exists in light of *Massaro*'s abrogation of *Billy-Eko*. It remains to be seen whether the Second Circuit will now revisit the approach it adopted in *Riascos-Prado*.

The Tenth Circuit in *Galloway* did not disagree with the court of appeals below on the question whether each alleged failure by trial counsel constitutes a different ground for relief. Rather, the Tenth Circuit concluded that "an ineffectiveness claim may be viewed as unitary, regardless of the number of separate reasons advanced in support of the claim," and that a "unitary claim by

definition cannot easily be split into two proceedings on any logical basis." 56 F.3d at 1241. Although the court recognized that the normal rule was that the assertion of such a claim on direct appeal would bar its assertion on collateral review, the court elected to adopt a special rule for ineffectiveness claims. In that context, the court reasoned, the procedural bar would be "absurdly easy to circumvent" and "painfully labor intensive to sort through and apply," because a defendant could assert that appellate counsel was ineffective in failing to raise "all possible reasons showing why trial counsel was ineffective." *Ibid.* The court therefore held that it would address on the merits an ineffectiveness claim raised on collateral review where the claim was based on different alleged errors committed by counsel than had been raised on direct appeal. *Id.* at 1242.

Although the court of appeals below disagreed with the approach adopted by the Tenth Circuit in *Galloway*, see Pet. App. 65a-66a, this Court's review is unwarranted. As explained, pp. 9-10, *supra*, the issue is unlikely to arise with any frequency, particularly in the wake of this Court's recent decision in *Massaro*. In addition, a court of appeals' choice concerning the application of law of the case principles to ineffective assistance claims does not ultimately affect the merits of any ineffectiveness claim or prevent any defendant from having at least one opportunity to have an ineffectiveness claim resolved. Once a circuit has established a procedural approach, defendants are on notice of the potential implications of raising an ineffectiveness claim on direct appeal rather than presenting it in a motion for a new trial or on collateral review under Section 2255. Also, insofar as the approach of the Tenth Circuit differs in the abstract from the approach of the Seventh Circuit,

the law of the case doctrine is inherently flexible and allows for consideration of equitable considerations in any given case. See *Castro* v. *United States*, 540 U.S. 375, 384 (2003) (explaining that the "law of the case doctrine * * * simply expresses common judicial practice; it does not limit the court's power") (quotation marks omitted).

Finally, it is not clear that the Tenth Circuit would reach a different resolution on the particular facts of this case. Petitioner has already raised an ineffectiveness claim on appeal on two previous occasions, and the court of appeals addressed the merits of the claim both times. Petitioner was afforded a full opportunity to develop his ineffectiveness claim—including an evidentiary hearing—in connection with his initial motion for a new trial. See Pet. App. 3a. He therefore is not in the same position as a defendant who raises an ineffectiveness claim on direct appeal based on certain alleged errors that are evident from the trial record, but who then desires to develop a factual record on collateral review in support of other alleged attorney errors. Because petitioner was already afforded an opportunity to develop a factual record in support of his ineffectiveness claim, it is not clear that the Tenth Circuit would afford him yet another opportunity to assert different attorney errors in a motion under Section 2255. See *Galloway*, 56 F.3d at 1240 (explaining that ineffectiveness claims ordinarily should be raised on collateral review because a "factual record must be developed in and addressed by the district court in the first instance for effective review"). For the same reasons, there is no unfairness in applying

the law of the case doctrine against petitioner in this case.[1]

3. Petitioner asserts (Pet. 13) that this Court's review is needed "to clarify the extent to which, and on what authority, district courts should apply the law of the case doctrine to first motions filed pursuant to" 28 U.S.C. 2255. That argument is not limited to ineffectiveness claims, but extends to any claim raised in an initial motion under Section 2255. There is no need for this Court to review the applicability of the law of the case doctrine to an initial motion under Section 2255.

As petitioner acknowledges (Pet. 14-15), this Court established in *Sanders* v. *United States*, 373 U.S. 1 (1963), that the law of the case doctrine generally bars the assertion of a claim in a Section 2255 proceeding if the claim was previously raised and addressed in a "prior application for federal habeas corpus or § 2255 relief." *Id.* at 15.[2] The Court subsequently indicated in

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[1] There is no merit to petitioner's contention (Pet. 11-13) that the court of appeals' decision conflicts in principle with this Court's decision in *Massaro*. The Court in *Massaro* specifically declined to address the "conclusiveness" in Section 2255 proceedings "of determinations made on * * * ineffective-assistance claims raised on direct appeal." 538 U.S. at 508-509. Insofar as the approach of the court of appeals encourages defendants to bring ineffective assistance claims on collateral review rather than on direct appeal (see Pet. 11-12), that result is fully consistent with *Massaro*. See 538 U.S. at 504 ("In light of the way our system has developed, in most cases a motion brought under § 2255 is preferable to direct appeal for deciding claims of ineffective-assistance."). As the court of appeals explained, Pet. App. 64a-65a, nothing in *Massaro* bars the court of appeals' approach below.

[2] Since *Sanders*, Congress has codified and strengthened the restrictions on the filing of successive motions for relief under Section 2255. See Antiterrorism and Effective Death Penalty Act of 1996, codified in relevant part at 28 U.S.C. 2255 para. 8; Pet. App. 63a.

Davis v. *United States*, 417 U.S. 333 (1974), that the same approach to the law of the case doctrine adopted in *Sanders* also applies when a claim was initially raised and resolved on direct appeal and is asserted again in an initial motion under Section 2255. *Id.* at 342.

Petitioner argues (Pet. 15-16) that the Court in *Davis* merely held that a claim raised and resolved on direct review may be raised in a Section 2255 proceeding if there has been an intervening change in law. According to petitioner, the Court did not establish that the law of the case doctrine otherwise would bar assertion of the claim, *i.e.*, even if there had been no intervening change of law. There is no merit to that argument. If a defendant were generally free to raise claims in Section 2255 proceedings that had already been raised and resolved on direct appeal, regardless of whether there had been an intervening change of law, there would have been no need for the Court to explain in *Davis* that a claim resolved on direct appeal nonetheless may be raised in a Section 2255 petition where there *has* been an intervening change of law. See 417 U.S. at 342. Petitioner identifies no lower court that generally permits a defendant to raise a claim in an initial Section 2255 motion even if the same claim was raised and resolved on direct appeal. See *Reed* v. *Farley*, 512 U.S. 339, 358 (1994) (Scalia, J., concurring) ("[C]laims will ordinarily not be entertained under § 2255 that have already been rejected on direct review."); *Withrow* v. *Williams*, 507 U.S. 680, 721 (1993) (Scalia, J., concurring in part and dissenting in part) (explaining that "federal courts have uniformly held that, absent countervailing considerations, district courts may refuse to reach the merits of a constitutional claim previously raised and rejected on direct appeal"). Accordingly, there is no need for this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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